Supreme Court of the United States.

THE UNITED STATES,
Appellant,

vs.

GEORGE P. LIES & CO.,
Appellee.

The decision of the Board of General Appraisers, which has been affirmed by the Circuit Court and the Circuit Court of Appeals, was rendered on the 18th of July, 1893 (Rec., fol. 44). In the decision that of the U. S. Circuit Court of Appeals in the case of Blumlein is referred to and followed (fol. 46). The decision in the Blumlein case was rendered in the Court of Appeals on April 18th, 1893. On June 12th, 1893—two months after the Blumlein decision, and about one month prior to the decision of the Board of Appraisers in the present case—the Secretary of the Treasury promulgated the Blumlein decision in the official synopsis of decisions of the Treasury Department, published for the information and guidance of customs officers (see Treasury Decisions for 1893, p. 498 [S. S. 14,096]). This circular, addressed to the Collector of Customs at New York, concluded as follows:

"In view of the foregoing you are hereby authorized to take measures looking to a settlement of this suit, *and you will apply these instructions to all similar cases* pending at your port, where the requirements of

law as to filing protest and appeal and notices of dissatisfaction and the institution of suits have been duly complied with.

"Respectfully yours,

"C. S. HAMLIN,

"Assistant Secretary."

In view of these instructions and this ruling of the Department, no appeal was taken by either the Collector or the Secretary of the Treasury from the decision of the Board of General Appraisers, which is the subject of the present controversy.

This brief recital will enable the Court to see very clearly that this is not a case where a party can claim that, by inadvertence, accident or mistake, the right of appeal was lost, or that an appeal the taking of which had been contemplated, was not taken in time. The real situation is that the Government of the United States, having accepted by formal promulgation a decision of a court of appeals in a revenue case as a sound exposition of the law, and having issued orders to carry it into effect, and having impliedly acquiesced in a decision of the Board of General Appraisers in harmony with this legal decision which it had accepted, and having omitted, not by accident, but with deliberation and full knowledge, to appeal from a decision of the Board of General Appraisers within the time and in the manner prescribed by law, seek a year and a half after said decision, to have it reviewed and reversed, because, according to the contention of some officer of the Government, a decision of the Supreme Court has intervened, which, had it been made before the Board of Appraisers' decision, might or would have produced a different result.

The determination of this appeal involves two distinct questions:

1st. Was there error in the decision of the Board of General Appraisers?

2d. Could the Collector or Secretary attack the decision for such error more than a year after it was rendered, the fact being undisputed that neither of them had filed a petition for review within the time or in the manner prescribed by Section 15 of the Customs Administrative Act of June 10th, 1890, or at any time or in any manner?

Unless both of these questions can be answered in the affirmative, the decision below must be affirmed. A negative answer to either question leaves the Government without any standing in Court. We purpose in this brief to consider both questions, and in the order in which they are suggested above.

~~It would certainly be a violent assumption that where two-thirds of the hands were found heavy and one-third light the presumption would be that the average was light.~~

POINTS.

I.

The decision of the Board of General Appraisers was clearly correct.

The decision of the board appears at folios 46 to 49 of the record. Part of the decision was favorable to the Government, and it may be assumed that the Solicitor-General is not attacking that part of the decision. The importers did not, upon the hearing in the Circuit Court, challenge the correctness of any part of the decision, and, therefore, the only part that needs to be considered here is that which is favorable to the importer. It is as follows:

> "The United States Circuit Court of Appeals recently decided in the case of Blumlein (and we

so hold in the cases now under consideration) that the bale is the unit, and that a bale of leaf tobacco, of which 85 per cent. is of the requisite size, fineness and weight, is dutiable at 75 cents, and, when there is a less percentage, at 35 cents per pound."

"In the absence of the merchandise *and of any evidence to impugn the returns of the appraiser* or to show the character of the tobacco, we find that the returns were correct, and, in accordance therewith, we hold that in the reliquidation the lots must be pro-rated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents per pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent. or less of wrapper tobacco."

This part of the decision should be taken in connection with the testimony on page 17 of the record, consisting of the table showing the plantation lots and marks, the numbers of the bales examined and the percentage of 35 and 75 cent tobacco respectively found in the bales by the examiner and adopted by the Collector as the basis of his liquidation which was revised by the Board of General Appraisers, and also the following paragraph of the stipulation (fol. 106):

"*The tobacco was of uniform grade*, and the examination of the respective bales by the Government officer was made by drawing not less than ten 'hands' from each bale, the hand consisting of a certain quantity of leaves tied together by the stems. The Collector classified the tobacco according to the percentages returned by the Appraiser dividing the examined bale and the lot represented by such bale into corresponding percentages of 75c. and 35c. tobacco."

The Solicitor General states under Point V. of his brief that if the Court below had passed upon the merits of the case it would have been bound to reverse the decision of the board, but we do not find in the brief either facts or arguments to support this contention. It seems to be assumed by the Solicitor General that this decision and the decision in the Blumlein case are inconsistent with the decision of this Court in the case of Erhardt vs. Schroeder, 155 U. S., page 124. But when that case is examined in the light of the circumstances under which it came before this Court and the record on which it was argued, it will clearly appear that there is no inconsistency between this Court's decision and that of the Board of General Appraisers now under review.

The situation in the Schroeder case was briefly this: The plaintiff had imported 429 bales of tobacco of which 30 bales had been examined at the public stores. The suit related to only ten of these bales withdrawn from warehouse. The appraiser had returned the percentage of light tobacco (containing more than 100 leaves to the pound), and of heavy tobacco (containing less than 100 leaves to the pound), and the collector had applied to the entire importation the percentages found in the portion examined by the appraiser, and had levied two different rates of duty upon the same bales of uniform tobacco. Upon the trial the plaintiff in the first place disputed the facts found by the Examiner, and undertook to prove that the true percentages of light and heavy tobacco in the bales were different from that found by the Examiner and adopted by the collector. After considerable evidence upon this point had been received, the Circuit Court directed a verdict in favor of the plaintiff for the full amount of his claim, on the ground that by reason of the failure of the collector to examine one package in ten of the importation, as required by the statute, the assessment of the higher duty upon any portion of the merchandise was illegal.

This Court held that the liquidation and assessment was not invalidated by the failure to comply with the statute requiring the examination of one bale in ten. This ruling, of course, necessitated the reversal of the judgment, unless upon the evidence as disclosed in the record the plaintiff was entitled to a direction in his favor for the full amount of his claim upon the proof as to the character of the tobacco. This Court found that the evidence did not warrant such a direction. At the close of its opinion it said:

> "Assuming that the importers, in testifying concerning the size and fineness of texture of tobacco, had in mind the proper test when speaking of the percentage of the surface suitable for wrappers, we must take their evidence to mean that *only five of the ten bales in controversy contained tobacco of which less than eighty-five per cent. fulfilled, as to the size and fineness of texture, the demands of paragraph 246.* It would seem, therefore, that the Court below was in error in directing a verdict for the importers, and that the judgment of that Court ought to be reversed, and the case remanded with directions to set aside the verdict and to order a new trial, in order that *a jury may pass upon the real character of the tobacco* contained in the ten bales withdrawn by the importers."

The only point in judgment, therefore, in the Schroeder case was whether the record in the case justified the direction of a verdict in favor of the plaintiff. In discussing the record the learned Judge who prepared the opinion made certain suggestions as to the proper method of examining the tobacco, based upon the evidence which the parties to that particular case had seen fit to introduce. None of that evidence was introduced by either party in the case at bar.

In their decision the Board of Appraisers say :

> "In the absence of the merchandise *and of any evidence to impugn the returns of the appraiser* or to show the character of the tobacco *we find that the returns were correct.*"

This is in accordance with the well-settled doctrine in these cases that a presumption of correctness attaches to the reports of Government officers, and if the taxpayer is not satisfied with their findings the burden of proof is on him to show that they are incorrect. The leading authority on this subject is the case of Arthur vs. Unkart, 96 U. S., 118. In the Schroeder case the plaintiff did attack the finding of the Examiner, and this Court held that the question of whether he had met the burden of proof and had established the incorrectness of the return was a question of fact for the jury. In the case at bar the Board of Appraisers acted as both Judge and jury to pass on both the facts and the law, as the statute creating the board and defining its powers directed they should. *The importers did not attack the return of the Appraiser.* In effect their position was : We concede the facts to be as you have ascertained and officially reported them ; we concede that the bales you examined contained the percentages of light and heavy tobacco which you say they contained, *and upon those facts so officially found by you we claim the assessment was erroneous as matter of law.* In this situation the Board of Appraisers could do nothing but find the report of the Appraiser to be correct. It is now suggested by the learned Solicitor General that *because the Appraiser did not examine the tobacco in the way suggested in next to the last paragraph of the Schroeder decision the presumption should be that his return was incorrect,* and the burden of proof was upon the importer to show that it was correct. No authority is cited for this extraordinary proposition, and we believe none can be.

In effect, the argument of the Solicitor-General seems to be that where the Appraiser had examined tobacco on July 19, 1890 (fol. 101), according to a method which had been prescribed by the Secretary of the Treasury (see Treasury decisions SS. 8299), who had full power under Section 249 of the Revised Statutes to make such regulations, and upon such examination had officially reported certain facts as to the character of the merchandise examined, because in an opinion handed down in this Court on November 12th, 1894, a different method of examination is suggested as being a proper one, *the presumption that the Appraiser's return was correct became converted into a presumption that it was incorrect*, and the burden of proof was cast upon the importer to show by examinations conducted according to the method suggested in the opinion of this Court in 1894, that the facts found by the Appraiser in 1890 in accordance with the law and regulations were correctly, and not incorrectly, found. We submit that the mere statement of this proposition is its sufficient refutation. We submit that where a citizen *wishes to contest the correctness of the conclusions of law* deduced by an officer of the Government from *facts officially ascertained* and found by him, he is not to be called upon to prove affirmatively the correctness of the facts so found, and we respectfully insist that our contention in this regard is founded not only in reason, justice and common sense, but on the authority of this Court (Arthur vs. Unkart, *supra*), and that no argument—much less any authority—is cited in support of the Government's contention.

The particular facts found by the Appraiser in the case at bar will repay more detailed examination, and for this purpose we invite attention to his report as it appears on page 17 of the record. It appears that he examined 39 bales, representing 15 plantation marks. As he examined 10 hands from each bale, he examined 390 hands. The percentages in his table show that he

found 250 hands containing less than 100 leaves to the pound, and 140 hands containing more than 100 leaves to the pound. In other words, *he found 250 hands of heavy or 35-cent tobacco and 140 hands of light or 75-cent tobacco.* Almost two-thirds of the hands examined, therefore, were heavy or 35-cent tobacco. Yet we find in the Solicitor General's brief this suggestion:

> "He did not make an examination of the ten hands collectively, as he should have done under the Schroeder decision. He did not bunch the ten hands and ascertain how, on the average, the leaves ran with respect to weight. Such an examination might have shown that *all* the tobacco was dutiable at 75 cents. The hands taken as indicating 75-cent tobacco may have contained leaves so light in weight as to more than overbalance the heavier leaves contained in the hands which were taken as indicating 35-cent tobacco if the statutory test had been applied to the general collection of all the representative leaves, irrespective of their casual association in the respective hands."

Having considered this invoice as a whole, let us take some of its parts and see what basis there is for the Solicitor-General's speculation. Of the plantation lot S S 1, represented by bales 153–63, bales 153 and 163 were examined by the Appraiser, *who found 19 hands heavy and one hand light.* Is there much room for the suggestion here that the average might have been light? Of the plantation lot B B 1, comprising bales 193–224, four bales, viz., 193, 203, 213 and 224 were examined by the Appraiser, and *of the 40 hands examined 38 were found heavy and 2 light.* What would such a return indicate as to the average weight of leaves? Of the plantation lot S 1, comprising bales 263–284, three bales, viz., 263, 273 and 284, were examined, and *of the 30 hands examined 29 were found*

heavy and one light. Will the Solicitor-General suggest that the one hand may have contained leaves so light in weight as to more than overbalance the heavier leaves contained in the other 29 hands? And how about plantation lot S S 1, represented by bales 338–59. Here there were three bales examined, viz., 338, 348 and 359, and *of the 30 hands examined 26 were found heavy and 4 light.*

In the Schroeder case this Court said: "A further requirement of the act is that the leaves of the collection must be of such average lightness that more than 100 are required to weigh a pound." When an official examiner, examining goods in accordance with regulations prescribed by the Secretary of the Treasury and with authority of law, reports officially that he found $\frac{12}{30}$ or $\frac{26}{30}$ or $\frac{29}{30}$ of the tobacco examined by him to be of such heaviness that less than 100 leaves are required to weigh a pound, will this Court say that such an official return is not to be taken as establishing that the leaves of the collection were of such average heaviness that less than 100 leaves were required to weigh a pound, simply because an examination had not been made in the manner which had been *suggested* in a subsequent opinion of this Court, *by way of illustration*, as being the most suitable. To this question this branch of the case ultimately narrows itself down.

The importation in this case was 310 bales. The appraiser examined 39 as representing the invoice. Of the whole quantity that he examined he found about two-thirds to be of such weight that less than 100 leaves were required to weigh a pound, and, as we have just seen, as to some parts of the invoice he found from 85 to 95 per cent. of the representative part that he examined to be of such weight that less than 100 leaves were required to weigh a pound. "The tobacco was of uniform grade (fol. 106), and the collector classified the tobacco according to the percentage returned by the appraiser, dividing the examined bail

and the lot represented by such bale into corresponding percentages of 75-cent and 35-cent tobacco." That this mode of *liquidation* was illegal is no longer disputed. This Court is now asked to assume that although the appraiser officially found two-thirds of the entire quantity of the tobacco to be heavy tobacco, and from 85 to 95 per cent. of certain parts of it to be heavy tobacco, an examination by some other method might have shown that all the tobacco was dutiable at 75 cents. We submit there is nothing to justify such an assumption.

During the seven years while the Tariff Act of 1883 was in force, millions of bales of leaf tobocco were imported and examined. The examination was made according to regulations prescribed by the Secretary of the Treasury, who is expressly authorized by statute to make such regulations. The importers had no right to prescribe the method of examination which should be pursued by the Government examiners, and any suggestions made by them on the subject would have been disregarded and were disregarded. From the official examinations so made certain facts were found and officially adopted. Upon these facts and a certain construction of the law adopted by the Government the liquidation of the entries was made. That construction of the law is now practically conceded to be erroneous. Upon the facts officially ascertained the importers are entitled to relief and restitution, which the Board of Appraisers have decided in this case they should have. *The Government now seeks to repudiate the findings if its own officials, and to throw on the importers the burden of proof, not that the facts are different from those officially found, but that the official finding was correct.* This is in effect to claim that the importers should be left without any remedy against an illegal exaction. How could the importers furnish in these cases proof which the Solicitor General contends they should have furnished? They had no means of knowing which hands the Appraiser examined, and

as the Appraiser found differences between the hands that he examined, as indicated by his tabular return, we may suppose that, if the importers had examined ten hand according to the method suggessted by the Solicitor General they would have found differences. If their results differed from those of the official examiner would a court be justified in accepting their examination as more reliable than that of a Government official? It would have been physically impossible for them to have examined every hand in every bale, and if they selected parts of bales, hands or leaves, would a Court be justified in holding, or permitting a jury to hold, that the character of the rest of the merchandise was to be gauged or determined by that of the part which the importer himself examined? *It is one thing to allow the Government official to examine part as representative of the whole, and to classify the whole according to the qualities of the representative part examined, and quite a different thing to allow the importer who has to pay the tax to do the same thing.* Does the Solicitor-General contend for the proposition that the Government's right to collect revenues, or its obligation to refund them, should be made to depend upon the taxpayer's own testimony as to a small portion of the importation examined by him, and his insistence that the portion not examined would show the same results as the portion examined? Or does the Solicitor-General contend that unless the importer could have examined by experts every hand of every bale of tobacco upon which, or upon any portion of which, he paid 75 cents a pound duty during the seven years from 1883 to 1890, he was without any remedy whatever against any exaction which the Collector of Customs might make, *even though that exaction under a proper construction of the law was wholly unjustified by officially ascertained facts upon which he claimed to base it?* To one or the other of these propositions the Solicitor-General must give his endorsement or abandon the claim that the

importers were disentitled to relief in the case at bar for lack of evidence.

Let us see how the theory of the Solicitor-General would apply in the case at bar. There were 310 bales. As was found from the evidence in the Blumlein case cited in the Collector-General's appendix, a bale contains from 600 to 700 hands. Let us say 600. *There were, therefore, one hundred and eighty-six thousand hands in the importation.* Of these the Appraiser examined 10 hands from each of the 39 bales, or 390 hands; upon which he officially reported certain percentages of the heavy and light tobacco. The Solicitor-General now claims that in order to have the law applied to the facts so officially found we should have proved by evidence of a different kind from that resorted to by the Appraiser that the facts so officially found were correctly found. Now, how should we have done it? Should we have weighed and counted the leaves in the whole one hundred and eighty-six thousand hands, or in some less number, and if the latter, how much less? Of the total number of hands in the importation the Appraiser examined about one-fifth of one per cent. Of course, we did not know which particular hands he examined If we had examined an equivalent number of hands, and upon testimony as to what we ascertained on an examination of one-fifth of one per cent. of the entire importation had asked the Court or jury or Board of General Appraisers to hold that the result of the examination should be held to apply to the whole importation, does the Solicitor-General think it would have been a reasonable contention?

Upon any view which may be taken of the facts in this case the Board of Appraisers were abundantly justified in their decision, and this Court could not properly be asked to reverse it, even if the Government had put itself in position to entitle it to ask for a review of the decision on the merits.

II.

The Government was not entitled to have the Courts review the decision of the Board of Appraisers on the merits, or to be heard otherwise than in support of said decision, by reason of the failure of the Collector and Secretary of the Treasury to file a petition for review, as required by Section 15 of the Customs Administrative Act of June 10th, 1890.

This is the point upon which the Courts below based their decision, and to which most of the elaborate argument of the Solicitor General is devoted. It would seem there could be little argument on such a question, where the language of the statute providing for a review of the decision of the Board of General Appraisers was so plain and clear as it is in this case. The language of the statute is as follows:

> "SEC. 14. * * * Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and *their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly*, except in cases where an application shall be filed in the Circuit Court within the time and

in the manner provided for in Section fifteen of this act.

SEC. 15. That if the owner, importer, consignee or agent of any imported merchandise, *or the Collector or the Secretary of the Treasury*, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, *they, or either of them, may, within thirty days next after such decision, and not afterwards*, apply to the Circuit Court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. *Such application shall be made by filing in the office of the Clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the* collector, or on the *importer*, owner, consignee or agent, as the case may be."

This language permits of no other rational construction than the following:

1st. That a decision of the Board of Appraisers is final unless appealed from.

2d. That it is final against the importer if he does not appeal from it, and against the Government if the Collector or the Secretary of the Treasury does not appeal from it.

3d. That the party appealing must set forth in his petition for review the errors on which he relies.

4th. That the only questions to be considered by the Court are those raised by the petition for review.

If the statute does not mean this, it has no meaning. To say that a statute requiring a dissatisfied party to file a petition for review in which he shall set forth the errors upon which he relies, permits either party to attack the decision on any ground whatever, whether set forth in the petition for review or not, is to reduce the statute to an absurdity. To hold, as the Solicitor General contends, at the top of page 30 of his brief, that—the application "is not for a review of the errors of law and fact thus complained of, but for a review of the questions of law and fact involved in such decision. Upon the filing of the application, whether by the importer or the collector, and the making of service, the Circuit Court obtains jurisdiction of the case for the purpose of a full review and a final and conclusive determination"—is to render the provision requiring the filing of a statement of errors of law and fact nugatory and meaningless. Of what use is a statement of the errors of law and fact complained of, if the hearing and determination may apply to errors of law and fact not complained of. Of what use is the requirement of the law that the dissatisfied party must file a petition for review, if the dissatisfied party may take advantage of the filing of a petition by the other party to raise any questions which he did not see fit to make the subject of an appeal. Of what use is the provision that the application for review must be made within thirty days and not afterwards, if the dissatisfied party can come in two years and five months after the decision and ask to have the Court review it for alleged error.

Section 15 of the Customs Administrative Act concludes as follows: "Said *Circuit Courts* respectively may establish and from time to time alter *rules and regulations* not inconsistent herewith for the *procedure* in such cases as they shall deem proper." It will be observed that the statute confers this power to make rules upon the Circuit Courts, and not upon the Circuit Court of Appeals or the Supreme Court. In pursuance of this statutory authority the Circuit Court

of the United States for the Southern District of New York has made rules on this subject. They are published (see Rules of the Circuit Court of the United States for the Southern District of New York, revised by John A. Shields, Clerk ; New York, Baker, Voorhis & Co., 1896). On pages 50 to 52 of this publication appear the rules on appeals from the Board of General Appraisers. Rule 6, adopted November 30th, 1891 (the return of the Board of Appraisers in the case at bar was filed September 18th, 1893 (Rec., fol. 31), and the case was heard in the Circuit Court December 19th, 1895 (Rec., fol. 67), is as follows: "No testimony shall be taken by the General Appraiser *except such as shall be relevant to the questions raised in the statement of the errors of law and fact complained of, filed on the application for the order to return the record.*" This shows that from the time the Circuit Court began to settle the practice under this statute it clearly took the position, and promulgated it by rule, that the questions to be raised and decided in court were those which had been set forth in the petition for review, and no others.

In the case of *In re* Crowly, 50 Fed. Rep., 465, the importer had made precisely the same claim as is now made by the Solicitor-General. The Collector had appealed from a decision, the importer had not, but when the Collector's appeal was brought on for hearing the importer claimed the right to have reviewed so much of the decision of the Board of General Appraisers as was unfavorable to him. The record shows (p. 467) that it was argued in behalf of the Collector and the Government that *the importers having filed in the Circuit Court no statement of errors against the decision of the Board of General Appraisers* under Section 15 of the Act of June 10th, 1890, *the only matter before the Circuit Court was the determination of the question raised by the Collector's appeal.* The Circuit Judge said :

> " The Court declines to go into the question as to whether they correctly determined that the silk embroidery made the article upon which it was placed dutiable as if it had been embroidered in wool, *for the reason that there has been no statement of any error of law or fact complained of, touching such decision, filed in this Court,* or any application for review thereof in that particular."

This decision was affirmed by the Court of Appeals in the case of U. S. vs. Crowly, 14 U. S. Apps., 97.

The general principle that a respondent or appellee cannot be heard in opposition to the judgment or decree appealed from, but only in support thereof, is too well settled to require discussion. See the following authorities :

> The Stephen Morgan, 94 U. S., 599.
> Corning *et al.* vs. The Troy Iron and Nail Factory, 15 How., 451.
> London vs. Taxing District, 104 U. S., 771.
> The Quickstep, 9 Wall., 665.
> Chittenden vs. Brewster, 2 Wall., 194.
> Beebe vs. Richmond Power Co., 6 N. Y. App. Div., 187.

This principle has been expressly applied by this Court to appeals from the Court of Claims. See U. S. vs. Hickey, 17 Wallace, 9. And as regards applications for review under statutes which require the grounds of appeal to be stated in the notice, the rule is well expressed in the decision of the New York Court of Appeals in the case of Matter of Davis, 149 New York., 529, at page 548, where it is said :

" Moreover Section 13 of Chapter 399 of the laws of 1892 provides that upon such an appeal the notice shall state the grounds upon which it is taken, and *where a statute requires the ground of appeal to be stated none except those specified can be considered.* The hearing must be limited to the errors noticed in the appeal. *Otherwise the requirement of the statute would be without significance.*"

The Solicitor General cites as bearing upon this question the case of Grisar vs. McDonald, 6 Wallace, 363, but an examination of that case, and of the statutes construed by it will show that it is not an authority upon the case at bar, and, so far as it is relevant, sustains the position of the appellees.

The California Land Claim Statutes are not analogous to the Customs Administrative Law. Under those statutes the mere filing of a transcript of the proceedings of the Board of Commissioners *operated ipse facto as an appeal for the party against whom the decision shall be rendered.* The Custom Administrative Law requires the dissatisfied party 'within thirty days, and not afterwards, to file a concise statement of the errors of law and fact complained of.' Whatever other analogies there may be between these two statues *they are absolutely dissimilar in the very point* which lies at the foundation of the present appeal.

But even in that case (where both parties had continued the contest in the Circuit Court), Mr. Justice FIELD said:

> "Had the city accepted the leave granted, withdrawn her appeal and proceeded under the decree as final, such result (close of the controversy) would have followed."

In the case at bar, the appellees here conceded the correctness of the board's decision, and moved for judgment affirming it. No reason can be suggested why a different rule should apply where a party confesses the correctness of a decision in open court, and submits to a judgment affirming it from that which would apply if he asked to have his appeal dismissed.

The case of U. S. vs. Richey, 17 How., 525, cited by the Solicitor General, has no application, for the question there involved was not whether a party not appealing could attack a decision, but whether the Board of Commissioners could be held to be a Court and

a delegation to that board of judicial power held to be unconstitutional.

The brief of the learned solicitor-general discloses some confusion of ideas as to the scope of the collector's power to reliquidate entries and as to the meaning of the term "reliquidate." Of course, whenever by reason of the discovery of some error in the absence of any legal proceedings, or by reason of decisions of the Courts or the Board of General Appraisers holding original liquidations to have been erroneous, it becomes necessary for the collector to recompute the duties under some different classification, or some other method than that which he originally followed, the recomputation is a reliquidation. The provisions of the administrative law referring to review of the collector's decision expressly provide that the collector shall liquidate the entry according to the board's decision, under Section 14, if it has not been appealed from; and, under the decision of the Court, under Section 15, if the appeal had been heard and decided. When the case at bar is decided, if it shall be decided in favor of the importer, the collector will be called upon to reliquidate the entry according to the decision of the board, as affirmed by the Circuit Court, and as this liquidation will be on a different basis from that of his first liquidation, against which the protest was lodged, it will be a reliquidation. If the solicitor-general means to contend that after proceedings for review have been instituted in accordance with Sections 14 and 15 of the Administrative Act, the collector, nevertheless, has power to make reliquidations irrespective of the decisions of the Board of General Appraisers and the Courts, his assumption is clearly not only erroneous but unreasonable. It would be a strange anomaly that, while the Courts were considering the question of how an entry should have been liquidated, the collector could go on and make a new liquidation without regard to the proceedings in Court or its decision, or that after

the Court has decided he should reliquidate in one way he should be, nevertheless, at liberty to reliquidate in some other way. If such a claim is intended to be set up on this appeal it is certainly the first time it has been made, and it would seem that some very convincing authority should be cited to justify so remarkable a proposition.

The provisions of law cited by the Solicitor-General on page 28 of his brief contain nothing to justify this extraordinary theory. Section 249 of the Revised Statutes simply provides that the Secretary of the Treasury shall direct the superintendence of the collection of duties. It contains nothing whatever bearing upon, or in any way relating to, proceedings to review the actions of the Collector or Secretary in collecting duties in case the party who pays them is dissatisfied with the amount collected or the classification under which the duties are assessed. Section 251 of the Revised Statutes is of a similar character. It authorizes the Secretary to make general regulations not inconsistent with law to be used in carrying out the provisions of law relating to raising revenue from imports or to duties on imports. It is an administrative statute intended to place the various collectors in different parts of the country under the general supervision and control of the Secretary of the Treasury. *It has no application to proceedings for review after the duties have been collected*, as has been expressly decided by this Court (Morrill vs. Jones, 106 U. S., 466; see, also, Baifour vs. Sullivan, 17 Fed Rep., 231). Section 2949 of the Revised Statutes relates solely to appraisement of merchandise, and not only is it confined to the direction of the original action of the Government officer in dealing with an importation, but it has no relevancy whatever to the case at bar, for the reason, among others, that the merchandise in controversy was subject to specific duty, and was not the subject of appraisement at all. Section 2652 of the Revised Statutes is of the same general character as Section 249, and has

no bearing upon the statutes relating to the review of decisions of officers of the customs after they have carried into effect the instructions of the Secretary. That section provides that the decision of the Secretary of the Treasury shall be conclusive and binding upon all officers of the customs. This means, of course, when considered in *pari materia* with later statutes providing for review of the action of officers of the customs, and requiring the Collector to liquidate the entry according to the decisions made upon such review, that the Secretary's decision shall be binding as matter of administration upon officers of the customs until the Board of Appraisers or the Courts have decided his construction of the revenue laws to be erroneous. Section 21 of the Act of June 22, 1874, is a provision limiting the time within which a Collector of his own motion, irrespective of decisions of the Courts, may reliquidate an entry.

So far as we can understand the argument of the Solicitor General upon this branch of the case, it is in effect a contention that the whole elaborate scheme provided by Congress in the Customs Administrative Act for the decision of disputed questions of fact and law as to the classification of merchandise shall be disregarded and rendered inoperative because of the language of earlier statutes giving the Secretary of the Treasury general supervisory action and control over the proceedings of the various Collectors of Customs. There is no excuse for such a contention, and, if it could receive endorsement or sanction, it would turn the whole legislation relating to review of Collector's actions by the Board of General Appraisers and the Courts into chaos.

Moreover, it is difficult to see what the Solicitor-General is aiming at when he speaks of the right of the collector to reliquidate for the purpose of assessing higher duties. The collector has not sought, and is not seeking, to exercise any such right in this case. What he is trying to do is to have the original liquida-

tion stand, while the importer is insisting that the entry should be reliquidated in accordance with the provision of Section 14 of the Customs Administrative Act, that a decision of the Board of Appraisers "shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector, or person acting as such, who shall liquidate the entry accordingly."

At the beginning of Point 3 of his brief (p. 33) the Solicitor-General says: "The application for review in the Circuit Court is not an appeal or a proceeding in error to review a judicial determination made by the Board of Appraisers." It is, of course, immaterial, as pointed out by the learned Judge who wrote the opinion in the Court of Appeals (fol. 39), whether the proceeding provided for in Section 15 of the Administrative Act be called an appeal, or a review, or a transmission of the case. The name is of no consequence. *The proceeding is a statutory proceeding*, and *the rights of the parties are created and defined by the statute*, and the provisions of the statute must be complied with. But, in view of the objection of the Solicitor-General to the term "appeal," and in view of his suggestion that the Treasury Department has taken views similar to those set up in his brief, it may not be inappropriate to call attention in this connection to various circulars and decisions of the Department showing what its attitude on this question has been.

On August 24th, 1891, the Treasury Department, refusing an application by counsel for certain importers for a refund of certain duties, where the Board of General Appraisers had decided their protest adversely, and they had not filed a petition for review under Section 15 of the Act of June 10th, 1890, quoted an opinion of the Solicitor of the Treasury containing the following language: "No application was made to the Circuit Court for review of the decis-

ion of the Board of General Appraisers, so by operation of Sections 14 and 15 of the Act of June 10th, 1890, *their decision had become final and conclusive as to both the importers and the Collector*" (see SS. 11,647, Treasury decisions for 1891, Volume 2).

On August 26th, 1892, the Treasury Department issued the following circular (SS. 13,145 Treasury decisions for 1892, Vol. 2):

"SUSPENSION OF DECISIONS OF BOARD OF GENERAL APPRAISERS.

"TREASURY DEPARTMENT, August 26, 1892.

"GENTLEMEN—The Department is in receipt of your letter of the 23d instant, in which the allegation is made that, in the case of decisions rendered by the Board of United States General Appraisers at New York, adverse to the assessment of duty by the collector, *the various collectors are not notified of appeals to the Courts which may be taken therefrom either by the collector or the Department* under the provisions of Section 15 of the Act of June 10, 1890.

In reply thereto, I have to state that the Department has notified collectors of customs that decisions of the Board of General Appraisers will go into effect after the expiration of thirty days from the date thereof, *unless, in the meanwhile, appeal has been taken under the provisions of Section 15 of* the Act of June 10, 1890, in which case they will be advised, and action will be suspended under decisions until the questions involved are judicially determined (see circular of November 15, 1890, Synopsis, 10,369). *Customs officers are also required to notify the Department of the taking of such appeals* (see circular of November 18, 1891, No. 179), and are directed *upon receipt of notice of such an appeal* 'to take no official action under and by virtue of such decision until the question shall be judicially determined.'

"In the case of the decision of the Board of General

Appraisers on Astrachan trimmings (C. A., 1496), the records of the Department show that collectors were duly notified to disregard such decision and to continue the assessment of the higher rate.

"Your allegation, therefore, would appear to have no foundation in fact, and *your suggestion that instructions be issued generally to customs officers in all cases of appeals from adverse decisions of the Board* would seem to have been anticipated by the Department.

"Respectfully yours,

"O. L. SPAULDING,

Assistant Secretary.

"(1526*g*)

"THE KURSHEEDT MANUFACTURING CO., New York, N. Y."

On August 3, 1895, the Treasury Department promulgated a decision (SS. 16,370, Treasury Decisions for 1895, p. 800) entitled "*Appeals under Section 15 of the Act of June 10th, 1890.*" In this decision not only does the Secretary repeatedly refer to applications for review of the Board of General Appraisers decisions as appeals, but encloses an opinion of the Attorney-General containing the following sentence: "*This does not mean that the Collector may appeal against the decision or wishes of the Secretary,* but that, as either may be the officer who ultimately acts for the Government, *the right to appeal is given to either, as the case may be.*"

On March 16th, 1896, the Secretary of the Treasury issued general regulations providing for applications for review of the decisions of the Board of General Appraisers (SS. 16,908, Treasury decisions of 1896, page 211), from which we quote the following paragraphs:

"Whenever a decision has been made by the Board under Section 14 of the above act, in regard to the classification of any kind of merchandise and *no appeal has been taken to the Courts within the prescribed period,*

under Section 15 of the said act, such decision will govern the liquidation of the particular case which was the subject of the decision. *In the absence of such appeal* and of contrary instructions, all similar goods will be treated in liquidation in accordance with the classification established by the Board.

"*Should appeal be taken by the Government* against such decision, the classification will continue to be made by collectors in accordance with that which was the subject of protest by the importer. *Due notice will be given of the result of every appeal* and collectors will thereafter be guided by the judgment of the Court.

"Whenever protest has been filed against the collector's action and the final decision of the Court shall be in favor of the claim made by the importer upon any contention regarding the revenue laws, reliquidation of the entries thereby affected will be made, and duties wrongfully exacted, if any, will be refunded as provided by existing regulations."

"On October 12th, 1897, the Department promulgated a decision (SS. 18,455, Treasury decisions of 1897, page 931) in which it directed a petition for review to be filed against a decision of the Board of General Appraisers unfavorable to the Government, in which it used the following language: '*The time within which an appeal may be taken* will expire 30 days from the 8th inst.' On October 9th, 1897, a similar decision was promulgated (SS. 18,480, Treasury decisions of 1897, page 954) where the same language was used. On the 23rd of October, 1897, in directing an appeal from a decision of the Board of General Appraisers unfavorable to the Government (SS. 18,496, Treasury decisions of 1897, page 966) the following language was used: '*An appeal having been taken under the provisions of Section 15 of the Act of June 10th, 1890*, from the decision of the Board of U. S. General Appraisers at New York on G. A. 3989 and 3993, which involved the question as to the time the

Act of July 24th, 1897, took effect, you are hereby directed to take no official action under and by virtue of said decision until the question shall be judicially determined.

" You will be duly advised when a final decision is reached.

" Respectfully yours,
" W. B. HOWELL,
" Assistant Secretary.

" COLLECTOR OF CUSTOMS, New York, N. Y."

The provisions of law in force prior to the enactment of the Customs Administrative Act for the review of decisions of Collectors as to the classification and rate of duty on imported merchandise (S. S., 2931, 3011 and 3012) are set forth at length in the appendix to the Solicitor General's brief, and extensively referred to in the brief itself, for the purpose of drawing analogies between the old method of procedure and the new. Comparison of the statutes governing the old procedure with those regulating the new only serves to bring out clearly the differences between the two systems deliberately created by Congress, and which differences it is the very object of the Solicitor General in this case to abolish. Under the old system, as the Solicitor General states, the importer was called upon to protest. Neither the Collector nor the Secretary was called upon to do anything. When the case came to trial in the Court, the importer was limited to the claim made in his protest, and could recover on no other ground, even if he showed the decision of the Collector to be erroneous. The Government might, and often did, defeat the importer by abandoning the position originally taken by the Collector and shifting its ground to some new paragraph or provision of the law, not referred to by either the Collector or the importer. It was the precise object of the adminis-

trative law to change this condition of things. The Board of Appraisers was created to review in the first instance the Collector's action and the importer's claim, and when that board had made a decision, it was provided that not only must the importer if dissatisfied file a petition for review and set forth the errors of which he complained, but that the Collector or the Secretary of the Treasury if dissatisfied must do the same thing. *The parties were placed on an equal footing* from the moment the Board of Appraisers decided the protest, with the single exception, that an appeal from the Circuit Court was granted to the Government as a matter of course, while the importers' right to appeal from a decision of the Circuit Court was made contingent upon the Circuit Court certifying that the question ought to be reviewed. As this requirement that the Secretary or the Collector, if dissatisfied with the decision of the Board of General Appraisers, must file a petition for review setting forth the errors complained of, and serve a copy of it on the importer, was a striking innovation in customs procedure, it is plain that it must have been deliberately adopted by Congress as a salient and vital feature of the new procedure. As is indicated by the Treasury decisions, referred to above, *the procedure has been followed uniformly by the Treasury Department in compliance with the law*, and the doctrine that the language of this explicit provision of the statute is meaningless and ineffective, and may be disregarded, is advanced for the first time in this case, and, apparently, only under the exigencies of the particular situation with reference to this merchandise. If so important a provision of the statute as the one under which the Government was defeated in the Courts below can be ignored and nullified in this case the whole statute becomes of little value.

The language of the provision specifying what must be contained in the provision for review is quite analogous to that of the provision of the statute providing

for the protest of the importer. Section 14 requires the importer, if he wishes to contest the Collector's action, to "give notice in writing to the Collector, setting forth therein distinctly and specifically, and in respect to each entry or payment the reasons for his objections thereto." This language has always been construed to mean, first, that the importer must file a protest, or have no standing in court; second, that he must be limited to the claims made in his protest (Davies vs. Arthur, 96 U. S., 148; Arthur vs. Dodge, 101 U. S., 34; *In re* Collector of Customs, 55 Fed. Rep., 276).

What reason is there why the language providing for the petition for review should not receive the same construction and be held to require of the Collector or the Secretary, as a *statutory condition precedent* to the right to review the Board of Appraisers' decision, first, that *one or the other of these officers must file a petition for review;* second, that *he must be limited to the errors set forth in the petition.* Yet, it is now claimed by the Solicitor General, not only that the Collector or the Secretary need not be limited to the errors assigned in his petition for review, but that he need not even make any such petition. In other words, the Solicitor General asks this Court to read the provision of the statute requiring the Collector or Secretary to file a petition and state concisely the errors of law and fact complained of entirely out of the statute.

III.

The judgment of the Circuit Court of Appeals should be affirmed.

Dated New York, April 22, 1898.

CHARLES CURIE,
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Counsel.